Before the
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Washington, D. C. 20036

In the matter of	)
	)
Distribution of Cable	)
Royalty Fees	)

STATEMENT OF DAVID J. STERN,
GENERAL COUNSEL OF THE NATIONAL
BASKETBALL ASSOCIATION

I am David J. Stern, General Counsel of the National Basketball Association.

My responsibilities include advising the Commissioner of the NBA, the Association's Board of Governors and the NBA Television Committee on all matters relating to the economic, administrative, legislative and legal aspects of cable television. I also have responsibility for commissioning research projects relating to NBA television policy and for compiling television research data for use within the NBA. I negotiate with suppliers of cable and subscription television programming and recently concluded the NBA's current cable television contract. I have presented to the Senate Subcommittee on Communications NBA's views on cable television issues and have responsibility for the presentation of NBA's position before the Federal Communications Commission on issues of concern to the Association.

It is NBA's view that the division of the Copyright Royalty Pool must be based on the value of the programming involved. An evaluation of value must take account of both (a) the comparative benefit of the distant signal programming to the cable system that is importing it, and (b) the comparative impact on all program suppliers of the importation of their television programs into distant markets. All distant station programming is not of the same value to cable, and the comparative burdens and inequities to copyright owners vary as between program types.

I want to provide NBA's perspective on why we think that distant live professional sports programming is exceedingly valuable to CATV operators -- indeed, why it has a promotional value to cable because of its attractiveness to subscribers that is not measurable in terms of hours occupied or similar measures. And, coming at the matter from the other side, I want to convey the reasons why NBA believes that professional sports uniquely suffers economic detriment when a telecast of a game which it has authorized for local television carriage in one market is carried in distant markets by CATV systems.

1. Telecasts of Live Sports Events Are the Most Valuable Component of Distant Signal Programming Carried by Cable Systems.

There are both historical and current evidences of sports' value to cable.

Early in cable's development significant regional networks were created by systems' desire for signals of distant stations with substantial sports programming. WOR-TV in New York was seen in hundreds of thousands of cable homes in the East via microwave prior to any satellite transmission of its signal as a "super station." WGN-TV in the Midwest was seen in nearly a million cable homes as was KTVU in the West, as a consequence of microwave. All of these stations are independents with an attractive lineup of live professional sports events.

When the signals of television stations were first available via satellite for distribution to cable systems, viewer preferences dictated that the stations be sports stations. Accordingly, the first four satellite-fed stations carried significant sports programming -- and NBA programming in particular. (*See*, *e.g.*, then WTCG (now WTBS) (carrying the NBA's Atlanta Hawks in addition to professional baseball and hockey), WGN-TV (carrying the Chicago Bulls in addition to professional baseball), WOR-TV (carrying the New York Knicks and New Jersey Nets in addition to professional baseball and hockey), and KTVU (carrying the Golden State Warriors and the baseball Giants).) Two more stations authorized for the satellites are also significant sports outlets.

The attractiveness of distant station sports to cable operators is demonstrated also in the other ways in which significant systems structure their distant signal carriage to maximize the carriage of live professional sports. In addition to regular distant signal carriage of significant sports stations, we have the following examples:

1. The station from Philadelphia that brings in the Phillies is alternated on New York area cable system with the seasons so that a Philadelphia station always is carried when it has professional sports -- WPHL-TV during the summer with baseball and WTAF during the winter with hockey.

2. During the winter, systems in the New York area regularly "cherry-pick" the stations that bring in the Philadelphia 76ers (WKBS-TV) and the Boston Celtics (WBZ-TV) to present the games of those teams live.

3. Theta Cable notes "NBA or NHL games from WGN, Chicago; WOR, New York City; or KTVU, Oakland, are usually last-minute schedule additions." (Program Guide attached.) There are no examples

given of "cherry-picking" of syndicated shows or old movies; nor is there any suggestion that any of the distant stations are brought in for their own news productions.

The preeminence of sports programming as a cable service -- and its value to cable systems -- is seen also in the fact that sports events are virtually unique among the programming on distant stations that is separately purchased by both cable systems and subscribers.

Theta Cable in Los Angeles, for example, carries WTBS, WOR-TV, WGN-TV and KTVU, all of which are sports stations. But Theta also pays both a program charge and a transmission charge in order to bring in the schedule of Madison Square Garden Sports (NBA basketball, NHL hockey, Indoor Soccer, etc.) and the Entertainment and Sports Network, another programmer of sporting events. Cable systems in the Philadelphia area see substantial sports from distant television signals, but they also pay for (1) ESPN, (2) the MSG Sports package, (3) a Major League Baseball package, and (4) PRISM -- which is a pay channel for which the subscriber pays extra and gets the 76ers, Flyers and Phillies games. ESPN and MSG Sports each currently have about five million cable subscribers. Systems or subscribers in the proximity of at least six NBA teams pay directly for the games of their teams on cable TV.

The point is, the marketplace has demonstrated that sports programming -- identical to the sports programming on distantly imported signals -- has an established value for cable operators of a magnitude which prompts them to pay added dollars for more of the same. The expenditure would not be made unless it more than paid for itself in terms of added subscribers or added revenues from subscribers.

To be sure, sports programming is not the only programming which is able to obtain additional payment from cable. A large number of cable systems have pay channels featuring first-run motion pictures and other quality productions. This is, in our judgment, a different programming product than that carried via distant television stations. It is one thing for a cable operator to offer, as a prime program selection, a popular, but perhaps dated movie, from a distant television station which may already have been seen on TV in the local market and which will be filled with commercials, if not seriously edited as well. It is quite another thing for a system to offer, even for an added fee, a channel bringing current motion pictures without commercial interruption and at convenient program times for subscribers. That is the distinction between distant signal movies and pay movies.

In the case of sports programming, however, the distant signal carriage and the pay cable showing of the live professional sporting event are identical. Notwithstanding the quite substantial distant signal importation of sports programming -- and the still greater importation in the offing via satellite -- there remains a cable market for more of the same. (Relevant to the Tribunal's task, however, is accounting in some way for the impact on that market from the substantial distant signal sports programming which is commonplace.)

The NBA does not suggest that there is no value to CATV operators in distant signal game shows, situation comedies, movies, action series, and the like, since they do provide a substantial programming selection, even though it is one duplicative of what is available locally.

There are, though, a number of distant signal programs that have no value to the cable operator, that he would not pay any price for in a free market, and that would probably be deleted altogether (and in some cases may be) in favor of something else but for the logistics involved. Falling into this category are purely local programs dealing with local problems and issues, including local news programs.

2. <u>The Adverse Impact of Distant Signal Importation on Sports Programming Is Far Greater Than That Suffered by Any Other Claimant.</u>

The nature and marketing practices of all sources of programming on distant signals, together with the various protections afforded to most non-sports programming, demonstrate that distant signal importation has a greater adverse impact on sports than on other forms of programming. This is inherent in the product. Sports is an attractive TV item because it is live, current and immediately topical. The value is normally earned once -- when the game is played (or shortly thereafter in a few cases of tape delays). The non-network market for each team is localized. In contrast, movies and syndicated programs may be seen again and again over many years in every market in the country.

Let me expand on this critical point.

The NBA, like all sports leagues, has one product to sell -- a live game between two teams. As a television attraction, it is a perishable and ephemeral commodity and, except in the rarest of instances, has no resale value -- when the game has been played there is no residual value to be captured. The same is not true for movies and syndicated programming.

The markets for professional games are, moreover, few in number and are largely mutually exclusive. When the Philadelphia 76ers are playing the Washington Bullets in Capital Centre, that game can be shown (a) to a national network audience, (b) to local over-the-air television audiences, (c) to local cable audiences, or (d) to a national cable network audience. The NBA's network will not purchase a game that will be shown on any other station or by any other means; a cable system will not be interested in purchasing a game that is available on local over-the-air television or network television. For our league the balance is a delicate one: there is (1) a network television contract calling for Sunday afternoon and playoff games, (2) a network cable contract calling for a Thursday Night game, (3) local over-the-air television contracts calling for the telecast of some "away" games back to the "home" fans, and (4) in only six instances, local cable contracts calling for the cablecasting of certain games in the "home" market.

Distant signal carriage of other games does not serve this television marketing structure. Direct siphoning of viewers arises when a cable system in Detroit imports a game between the Atlanta Hawks and the Boston Celtics at the same time that the Detroit Pistons (with the league's worst record) are playing at Utah (another team having a losing season) and televising the game back home to Detroit. Viewership -- and thus the value -- of Detroit's televised game is diminished. There is a cumulative aspect to siphoning, as well. If a viewer is able to see imported games every night of the week (and two games on some nights), then he will be less likely to watch any _one_ game -- including the network game which has been sold for a substantial sum based upon the fans it was expected to attract.

There is another consideration unique to sports. The choice of geographic markets is predetermined, since promotional _and_ economic considerations dictate that the sale by an individual club be made, in the first instance, in the city in which that club is located. That is where the product will have its greatest appeal, and that is where the business of the club dictates that the product be sold.

Finally, NBA teams, like all sports teams, are without a choice as to the city in which their product will be sold and do not even enjoy freedom of choice with respect to the particular station involved to escape the consequences of cable carriage -- _i.e._, the freedom to choose a station the signal of which is not distantly imported -- since, as noted at the outset, it is the presence of sports programming on a station that causes its signal to be a desirable one for importation in the first place.

These are problems unique to sports. Movies and syndicated programs are in a vastly different marketing situation. Putting to one side the theatre aspects of movie sales, both movies and syndicated shows are sold to maximize television viewing; they are licensed for viewing again and again on local stations around the country. Although for sports there is, for each game, only a one-time opportunity for TV revenues, for a situation comedy or a movie the opportunities are nearly limitless -- any particular episode of a series or any given movie may be seen on a network and, after that, many times on a station in each of the more than 200 television markets in the country. The damage from the distant signal carriage of such programs is minimal. Indeed, even apart from the fact that there seems to be no real injury whatever to the primary sales of such programs, such programs may also have regulatory non-duplication protection.

It is, of course, manifest that the local programming of television stations does not suffer any detriment by the distant importation of its signals. The value of WGN's Chicago news or its interview with the Mayor of Chicago is not in any way affected by a showing of that program in Los Angeles since WGN has no intention to market that programming in Los Angeles -- presently or in the future. Indeed, there is a direct benefit to the station, which may elect to increase the amount it may charge to advertisers because of the added viewership that distant signal importation provides.

In sum, the sports leagues have a product which is perishable -- the telecasts of its games live, as they occur. There is no secondary, tertiary, or other aftermarket of any kind. The market must be developed simultaneously with the event. Use of the product in one distribution outlet -- cable -- may impact the value of another such outlet -- local television. We believe sports to be uniquely threatened by distant signal carriage.

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I have sought by my testimony to approach the division of the Royalty Pool from two different perspectives which are keyed to an assessment of the value of distant signal programming -- first, from the standpoint of benefit of sports programming to the "buyer," the cable system, and, second, from the standpoint of the posture of the "seller," the Sports claimants. What emerges is that the Sports claimants have a highly desirable product which is used to great benefit by cable interests, and the great use made of that product by cable systems diminishes the value of the other markets to which the Sports interests must turn. It is the judgment of the NBA that these considerations, together with others being presented, compel the award of a large portion of the pool to the Sports claimants.

March 24, 1980